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October Term, 1996
No. 96-

Supreme Court of the United States

SUNNY BIG KEEM

Petitioner

vs.

CALIFORNIA

Respondent

Petition for Writ of Certiorari to the Court of Appeal Of the State of California, Second Appellate District

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Questions Presented

1. Especially in light of new restrictions on habeas corpus, does due process require a state court hearing a criminal appeal to adhere to minimum standards of factual accuracy and fidelity to higher authority regardless of the public importance of the issues in a given case ?

2. Does a state appellate court violate due process by affirming a conviction by inventing a theory of evidence not presented to or relied on by the trier of fact?

(a) In particular, in the conceded absence of sufficient evidence that the codefendant and alleged mastermind of the instant alleged conspiracy ever conspired with petitioner, and given the failure to name the deceased's sister-in-law as an uncharged conspirator or to present any evidence she knowingly joined a murder plot, is it consistent with due process for the court of appeal to uphold the conviction by appointing the sister-in-law a conspirator *de novo*?

3. Was petitioner denied a fair trial by the state's willful suppression of evidence?

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October Term, 1996

No. 96-

Supreme Court of the United States

SUNNY BIG KEEM

Petitioner

vs.

CALIFORNIA

Respondent

Petition for Writ of Certiorari to the Court of Appeal Of the State of California, Second Appellate District

Sunny Big Keem petitions for a writ of certiorari to review the judgment of the California Court of Appeal, Second Appellate District in this case.

Opinions Below

The opinion of the Court of Appeal of the State of California, Second Appellate District, was filed May 9, 1996. It was not published in the official reports; it is attached as Appendix "A" A timely petition for rehearing, preserving objection to the issues concerning handling of the appeal as presented in this petition, was denied May 21, 1996. The Order denying rehearing is attached as Appendix "B"

The Order of the California Supreme Court denying discretionary Review of the judgment of the court of appeal was filed August 14, 1996. It is attached as Appendix "C".

Jurisdiction

The judgment of the California Court of Appeal was entered on August 174, 1996 upon denial of discretionary Review by the California Supreme Court. The jurisdiction of this Court is invoked pursuant to Title 28, United States Code, section 1257, subdivision (a).

Constitutional Provision Involved

The constitutional provision involved is the Fourteenth Amendment, which provides in pertinent part,

"§ 1. . . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Statement of the Case

Petitioner and codefendant Pong Kyun Peak were charged in an information filed March 24, 1993 with conspiracy to murder one S.E. Kim. (Cal. Pen. Code § 182, 187 .) 13 overt acts were alleged in furtherance of the conspiracy; none of these alleged the actual killing of Kim; nor was Kim's sister in law (Mrs. So) named in any alleged overt act. Petitioner was additionally charged in a second count with solicitation to murder (*Id.* §653f, subd. (b).)

Following jury trial, Petitioner was convicted on both counts. Three critical overt acts were, however found "not true", including a allegations that the codefendant had expressed an intent to kill, and that petitioner had stated the object of the alleged conspiracy had cheated a friend out of an inheritance and was trying to ruin the friend's business. A mistrial was declared as to codefendant Paek, and the state subsequently dismissed against him for insufficient evidence.

Petitioner's motion for new trial was denied, and he was sentenced to a term of 25 years to life on July 11, 1994.

Petitioner timely appealed to the court of Appeal of the State of California, Second Appellate District on August 9, 1994. That court affirmed in an opinion filed May 9, 1996. After petitioning the court of appeal for rehearing, Petitioner then petitioned for discretionary Review to the Supreme Court of California. After extending the time to grant or deny Review, that court denied the petition August 14, 1996.

Reasons For Granting The Writ

Introduction: Constitutional Domestication Of State Criminal Appeals is Long Overdue

While this Court has made many pronouncements concerning the application of the due process guarantee to everything from police interrogation to the treatment of prisoners, there have been only two opinions this century dealing directly with the integrity of the state appellate adjudication. (*Frank v. Mangum* (1915) 237 U.S. 309 [35 S.Ct. 582]; *Cole v. Arkansas* (1948) 333 U.S. 196 [68 S.Ct. 514].)

In the wake of the Anti-Terrorism and Effective Death Penalty Act, 28 U.S. C. § 2261, the lack of minimal standards for state appellate review has become critical. Where before a wrongly convicted individual had a chance for correction of at least federally cognizable errors, now further remedy is available only to those wrongly convicted persons whose cases present issues of public importance. (See, e.g., Cal. Rules of

Court, Rule 29, subd. (a)(1) "important questions of law". Rules of U.S. Supreme Court, Rule 10 "special and important reasons".)

Injustice does not cease to be such because it is buried in obscurity. In California, the vast majority of criminal appeals are disposed of in unpublished opinions, as here. A significant portion of these have clearly identifiable material flaws. Here, for example, the appellate court invented a new conspirator out of whole cloth (App. A, pg. 20, opn. pg 12) and then curtly dismissed the prosecution's willful suppression of evidence on grounds it "only" went to credibility of the two key witnesses. (App. A pg. 27, opn. Pg 15.) *Brady v. Maryland* (1963) 373 U.S. 83 [83 S.Ct. 1194], of course, holds otherwise.

Under present practice, even where such clear flaws can be identified in an appellate decision, correction of those flaws is foreclosed if they are only of significance to the parties to the case. This may be convenient for state courts, but it is not due process.

Recognizing the practical limitations on plenary review for error by state supreme courts and by this Court, the Court nevertheless can and should require

states to establish mechanisms for summary remand and correction of plain error on the appellate level.

(a) Factual Summary

For purposes of this petition, the facts can be briefly summarized as follows:

Appellant Keem was accused of serving as the tool of one Pong Kyun Paek in a plot to assassinate Paek's brother-in-law, S.E. Kim in a family business dispute. The scenario involved Paek contacting his ex-Army buddy Keem in Colorado. Keem then recruited two sometime security guards and bouncers, Messrs. Bell and Brown, from his family's Denver, Colorado nightclub. All three then drove to Los Angeles where they contacted Paek.

Claiming that they fled California in horror upon learning that they were expected to kill Mr. Kim, Bell and Brown promptly told their story to Colorado authorities, in the process escaping a mandatory prison sentence for a felonious assault they had carried out in an unrelated matter. There was also evidence they stole appellant's camera and a sum of cash on the way out.

KIM was killed sometime later by a person other than appellant, who had also returned to Colorado and was in custody there at the time of the homicide.

Following a hung jury and declaration of mistrial as to mastermind Paek, the court dismissed the case against him for insufficient evidence.

Bell and Brown also told their story to a local newspaper reporter, Karen Bowers, embellished by many false claims of daring-do and heroism prior to each of their discharges from the military under questionable circumstances. Appellant subpoenaed Bowers, who resisted the subpoena under Colorado and California reporters' shield laws. The Los Angeles County District Attorney appeared in the Colorado court to support Bowers; she was ordered to appear in California, but allowed not to bring any of her notes. Bowers had previously revealed the contents of the notes to a defense investigator.

Once in California, Bowers was prevented by the prosecutor from testifying even concerning her published story by the somewhat astonishing claim that the absence of the notes - at their behest - precluded their cross-examination concerning the published story.

The court of appeal dismissed all concern over this chicanery with a single sentence: "We find it unnecessary to discuss whether the prosecutor committed misconduct in seeking Bowers's notes or the trial court erred in striking her testimony. The testimony Bowers gave was relevant only to the credibility of Bell and Brown." (App. A, Pg 27, opn pg. 15.)

I

Where A Conviction Is Upheld Based on A Theory of Evidence Invented on Appeal, Due Process is Denied

Not disputing that Kevin Brown and Donald Bell never joined any conspiracy and making little attempt to deal with the impact of the acquittal of alleged conspiracy mastermind Pong Kyun Paek, the state resorted to a fall back position: The conviction could be salvaged on the new theory that Mrs. Suk Hyang So ("Mrs. So"), widow of Pico Kim, was also a knowing member of a conspiracy to murder. Support for this theory is drawn from a passing reference in the prosecutor's closing argument; it is fundamental that argument is not evidence. Equally fundamental is that a reviewing court may not, consistent with due process, uphold a conviction based on a theory of evidence not presented to the trier of fact.

The following reference in the prosecutor's

remarks to the jury was cited as "applicable evidence" supporting the new theory " [Bell and Brown] were solicited to murder this man and there was a conspiracy between Sunny Keem and Mr. Paek at the very least *probably* also Mrs. So and her brother to commit this crime of murder." (RT 2137, emphasis added.) The remarks were made in the broader context of urging the jury to credit Bell and Brown's testimony, *not* to illustrate ways in which Mrs. So conspired.

Even if argument were evidence[1], this contention should have failed for one simple reason: *the case was not tried on such a theory*. Thus, there is no evidentiary support for it. While the information does contain catch-all "person or persons unknown" language (CT 279A-279D), the nature of the overt acts alleged (*Id.*) and the totality of evidence indicates the other conspirators were supposed to be Paek, Donald Bell and Kevin Brown. There is a complete lack of evidence that Mrs. So was

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1. The proposition that arguments of counsel are not evidence has repeatedly been characterized as "elementary" (*People v. Perez* (1992) 2 Cal.4th 1117, 1126, [9 Cal.Rptr. 577]) and "axiomatic" (*People v. Breaux* (1991) 1 Cal.4th 281, 313 [3 Cal.Rptr 81]) by the California Supreme Court.

knowingly a party to any agreement to kill anyone. This lack is demonstrated by the fact that though her identity and motives were at all times well known, Mrs. So was neither charged nor summoned to testify.

Respondent pointed to evidence that Mrs. So minimally assisted appellant in renting an apartment by issuing a local check, covered by appellant, when the manager refused an out-of-town check or cash. As a showing of "motive", it was also argued Mrs. So was engaged in business competition and a property dispute with her brother-in-law, S. E. KIM. None of that evidence establishes the Mrs. So sought to advance her position in those matters by homicidal means. Thus, no action by Mrs. So was specified as an overt act in furtherance of the alleged conspiracy.

In *Cole v. Arkansas* (1948) 333 U.S. 196 [68 S.Ct. 514], this Court held that a reviewing court denies due process of law if it upholds a conviction based on a theory not noticed and relied upon in the trial court.

> "No principle of procedural due process is more clearly established than that notice of the specific charge, and a chance to be heard in a trial

of the issues raised by that charge, if desired, are among the constitutional rights of every accused in a criminal proceeding in all courts, state or federal. . . . It is as much a violation of due process to send an accused to prison following conviction of a charge on which he was never tried as it would be to convict him upon a charge that was never made [ ].

"Furthermore, since Arkansas provides for an appeal to the State Supreme Court and on that appeal considers questions raised under the Federal Constitution, the proceedings in that court are a part of the process of law under which the petitioners' convictions must stand or fall. [ ] That court has not affirmed these convictions on the basis of the trial petitioners were afforded." (333 U.S. at 201, indicated[ ] internal citations omitted.)

By now switching theories of who knowingly joined a conspiracy to kill Mr. Kim, the court of appeal perpetrates an appellate ambush of precisely the kind condemned by *Cole*. By allowing that

ambush to succeed, the court of appeal has run afoul of the due process guarantees of the Fourteenth Amendment.

II

The State Has Engaged in a Systematic Course of Conduct Which Was Calculated to, And Did, Deny Appellant a Fair Trial Through Suppression of Relevant Evidence Undermining the Credibility of the Key Testimony of Messrs. Bell & Brown.

"It's not that Don Bell and Kevin Brown are liars, exactly, but they do tend to stretch the truth. Given an opening - any opening - the sometime security guards portray themselves as full-time bad ass hombres: martial arts masters, weapons experts, special op campaigners" (K. Bowers, "Seol Brothers" , *Westword* July 22, 1992 pg. 12 [see CT 300-304])

As has been pointed out above, there is no independent evidence that appellant personally killed or attempted to kill S. E. KIM. No evidence was introduced to suggest that appellant had conspired with anyone other than those named to kill KIM, an

event which took place well after the termination of the alleged conspiracy.

Instead, the entire case against appellant turns on one thing: the credibility of Donald Bell and Kevin Brown's assertions that appellant solicited them to commit murder. As the result of deliberate manipulation of the reporters' shield laws and the discovery statutes, however, the district attorney succeeded in suppressing important testimony concerning the credibility of these individuals.

During July, 1992, two articles pertaining to this case appeared in a Denver weekly newspaper known as *Westword.* Written by reporter Karen Bowers, the articles contained information gained from interviews with Donald Bell and Kevin Brown. Both - as usual - had attempted to impress Bowers with grossly exaggerated tales of their military exploits. These included false assertions that they had served as a sniper and an under cover agent, and had been involved in a secret drug investigation which had brought down an Air Force General.

Bowers was subpoenaed by the defense pursuant to the Uniform Act to Secure the

Attendance of Witnesses From Without The State in Criminal Cases, Cal. Penal Code section 1334 ff. It appears that the Los Angeles County District Attorney appeared in Colorado and supported Bowers' attempts to quash the subpena. This resulted in an order that Bowers appear at the instant trial, but only to give testimony based on her published work, consistent with the Colorado reporters' shield law (Colo. Rev. Stat. 13-90-119, subd. 2). [2]

Anticipating Bowers' testimony, appellant asked Bell a number of questions regarding claims which Bowers' published article attributed to him. These included that he was a secret intelligence agent for the Army, that he had been in the Special Forces and had done covert drug investigations, that he was a "cardiac arrest specialist" for covert operations, that his nickname was "snake" because he had worked as a boy on his parents' Texas ranch

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2. The only conditions which a foreign court may impose upon attendance of a witness in a California proceeding under the Uniform Act are those set out in Cal. Pen. Code § 1334.2, pertaining to immunity from arrest and service of process and to payment of travel expense and subsistence.

where snakes were milked for venom[3] , and that none of the above could be verified since his military personnel file was classified and could only be accessed by someone with special clearance. (RT 526-528) Bell denied making all these claims, and more.

Kevin Brown was asked similar questions pertaining to claims he had had a "sensitive" position in the military, that he had been a sniper in the Middle East, and had served in Operation Desert Storm. (RT 710-712) Brown's response was to suggest Bowers had made certain things up. (RT 710)

It was represented that Bowers had been ordered to appear after a Colorado court found that the published information in her articles was relevant

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3. Bell also denied telling another female acquaintance, Gayle Pixley, that he had served in the Navy Seals and that a character named Snake in the novel *Silver Star* by H.J. Riker had been based on him. (RT 533-534) He also denied making similar claims to Cheryl Hinrichs, who was left holding a large cellular phone bill after agreeing to have service established for Bell. (RT 539, 541, 1270.)

and material to the instant case. (RT 1441) [4] The trial judge here indicated that California law appeared to be the same as Colorado's in this regard. (RT 1443, 1518)

In evidence as Court's Exhibit 5 was a defense investigator's report prepared on July 28, 1993. The report reflected that Bowers had voluntarily answered numerous questions by making reference to her notes. These answers included such unpublished information as statements by both Bell and Brown that the other was "full of shit" (Ct. Ex. 5 pg. 2), a term also used by Bell's ex-wife after reading the first story. (*Id.* At 5) There was also a statement by a Sergeant Pigo that Brown was "too

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4. The Colorado order, entered by Judge Rice of Department 16 of the District Court on March 17, 1994, indicated that it was made in reliance on "Defense Exhibit "A", a report of an interview between the subpoenaed reported [sic] and an investigator acting for the defense attorney herein. The court is ordering her to do nothing more than she agreed to do when she chose to be interviewed about these matters."

A motion to take judicial notice of a certified copy of this order is being filed concurrent with the opening brief.

fat" to be a Marine (*Id.* at 4) and expressions of anguish by Bell's parents that he had misrepresented the family's history. (*Id.* at 4, 5)

Perhaps the most significant, Bowers indicated to the investigator that her notes showed that Bell and Brown both admitted stealing a camera and other property from appellant when they returned from Los Angeles, and that both claimed they were owed $4,000 for the surveillance work they performed. (*Id.* at 8)

(a) The Court Misapplied The Reporter's Shield Laws to Create an Absolute Privilege To Suppress Relevant Evidence

After Bowers had begun answering a few questions pertaining to her story (RT 1445), the prosecutor made a demand for her notes - the same notes she left in Colorado by the prosecutor's own doing. When Bowers protested that the notes were protected under the Colorado order, the prosecutor asked, "Are we in Colorado today, Ms. Bowers?" (RT 1450) At this point, the attorney from the law firm of Gibson, Dunn & Crutcher Bowers had

brought with her interposed an objection. (RT 1451) Bowers clarified she was testifying only from published information, and that she had not reviewed any notes in conjunction with her California testimony. (RT 1452)

The jury was excused, and the prosecutor renewed her demand for Bowers' notes. It was insisted that the notes were the "best evidence" of Bell and Brown's statements as published in the articles, and that the Colorado court order should be disregarded. (RT 1457) Although Court's exhibit 4 indicates that the Los Angeles County District Attorney appeared in the Colorado court when Bowers' subpena was litigated, the prosecutor asserted the Colorado order was not binding on her because "no one was representing my interests in Colorado". (RT 1460, see RT 1517)

This was a clear misrepresentation.

(b) The Preclusion Of Reporter Bowers' Testimony, Inappropriate Under the Reporters' Shield Law, Also Worked a Denial of the Right to Compulsory Process

After further wrangling, the court finally

resolved the issue by striking Bowers' testimony and excusing her as a witness. The court openly anticipated a motion for mistrial based on the ruling, which was forthcoming. It was - of course - instantly denied. (RT 1521)

It did appear from Court's exhibit 5 that the defense had disclosed a written investigation report of an interview with Bowers in Colorado. Since, as indicated by Court's exhibit 4, the district attorney had been privy to the proceedings in Colorado, she well knew that Bowers would have no such material with her, and would further resist any attempt to force her to disclose unpublished information.

If the court acted properly in suppressing Bowers' testimony because of her refusal to turn over notes, then no reporter can ever be required to testify ever to anything they have put into print or broadcast. The reporter need only insist on the confidentiality of notes or out takes, even if the unpublished material was not acquired in confidence, and even if it has willingly been discussed with an investigator, as here. Then, claiming a right to discover the unpublished material, the adverse party

can keep the reporter from testifying to his/her published story!

The public interest in having criminal trials resolved on the basis of truth, not to mention the constitutional right of defendants to present exculpatory evidence, simply does not permit such an extreme result. As Justice White wrote for the Court in *Branzberg v. Hayes* (1972) 408 U.S. 665, 691-692 [92 S.Ct. 2646]

> "The [First] Amendment does not reach so far as to override the interest of the public in ensuring that neither reporter nor source is invading the rights of other citizens . . . To assert the contrary proposition 'Is to answer it, since it involves in its very statement the contention that the freedom of the press is the freedom to do wrong with impunity . . . It suffices to say that however complete is the right of the press to state public things and discuss them, that right, as every other right enjoyed in human society, is subject to the restraints which separate right

from wrong-doing.' *Toledo Newspaper Co. v. United States* (1918) 247 U.S. 402, 419-420 [38 S.Ct. 560]

"Thus, we cannot seriously entertain the notion that the First Amendment protects a newsman's agreement to conceal the criminal conduct of his source, or evidence thereof, on the theory that it is better to write about crime than to do something about it. Insofar as any reporter in these cases undertook not to reveal or testify about the crime he witnessed, his claim of privilege under the First Amendment presents no substantial question. The crimes of news sources are no less reprehensible and threatening to the public interest when witnessed by a reporter than when they are not." [5]

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6. See also *University of Pennsylvania v. Equal Employment Opportunity Commission* (1990) 493 U.S. 182 [110 S.Ct. 577] (First Amendment "academic freedom" does not permit employer to suppress confidential material in discrimination suit) ; *Herbert v. Lando* (1979) 441 U.S. 153 [99 S.Ct. 1635] (right to

While this Court has left it open to the states to enact reporters' shield laws of the type in force in both California and Colorado, it remains clear that the operation of such state enactments can not work to deny *federal* constitutional rights.

The rights to compulsory process and to present relevant exculpatory evidence are, of course, federally protected (*Washington v. Texas* (1967) 388 U.S. 14 [87 S.Ct. 1920]; *Chambers v. Mississippi* (1973) 410 U.S. 284, 302-303 [93 S.Ct. 1030].)

Viewed in the light of the above authorities, the court's preclusion of Bowers' testimony effectively denied appellant the right to compulsory process. In that the entire case turns upon the credibility of Bell and Brown's uncorroborated assertions, the error can in no way be dismissed as harmless.

(c) The Prosecution's Tactics Amount to A Winking at Likely Perjury By Their Key Witnesses.

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discover news information pertaining to claim of bad faith in defamation case.)

The prosecutor's action in precluding Bowers' testimony after attacks on her articles had been made before the jury amounted to giving Bell and Brown license to commit perjury.

This Court has said " It is a fundamental rule of federal constitutional jurisprudence that the due process clause of the Fourteenth Amendment "cannot tolerate a state criminal conviction obtained by the knowing use of false evidence." (*Miller v. Pate* (1967) 386 U.S. 1, 7 [87 S.Ct. 785, 788]; *see also Mooney v. Holohan* (1935) 294 U.S. 103 [55 S.Ct. 340] *Napue v. Illinois* [(1959)] 360 U.S. 264 [79 S.Ct. 1173]

In *Miller,* a petitioner convicted of murder in the California courts successfully complained that the sole basis of his conviction "was perjured testimony, which was knowingly used by the prosecuting authorities in order to obtain that conviction, and also that these authorities deliberately suppressed evidence which would have impeached and refuted the testimony thus given against him." (Id. at p. 110 [55 S.Ct. at 341].)

As a reading of the *Westword* article will show, Bell and Brown made statements of fact to reporter Bowers which closely paralleled their testimony before the jury. Bowers's statements to defense investigator KILLAM further indicate they made statements attacking each other, and that they disclosed a motive for fabrication.

It is noteworthy that Bell had established a pattern of building himself up with lies before defrauding female acquaintances. Before he induced Cheryl Hinrichs to sign for his cellular telephone, leaving her with over $1000 in unpaid bills (RT 1270) , he claimed he had degrees in martial arts, had the nickname "Snake", held pre-law and pre-med degrees, and was the owner of a bar in Korea. (RT 1271-1273)

By allowing Bell and Brown's denials of false claims to Bowers to go uncontradicted, the court gave their testimony a false aura of veracity. The deleterious effect of this on the integrity of the proceedings is equivalent to that which occurs in the wake of perjury.

Conclusion

Certiorari should be granted, and the case remanded with directions to redetermine petitioner's claims of insufficient evidence based on the evidence actually presented at trial, and in all events to reverse the conviction for suppression of material evidence.

Respectfully submitted,
LAURANCE S. SMITH

APPENDIX A

OPINION OF THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION ONE, FILED MAY 9, 1996.

B086147

Super Ct. No. BA 69210

FILED May 9, 1996

Joseph Lane. Clerk

NOT TO BE PUBLISHED

COURT OF APPEAL OF THE STATE OF CALIFORNIA SECOND APPELLATE DISTRICT DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

SUNNY BIG Keem

Defendant and Appellant

_____/

APPEAL from a judgment of the Superior Court of Los Angeles County, Nancy Brown, Judge. Affirmed.

Laurance S. Smith for Defendant and Appellant

Daniel P. Lungren Attorney General, George Williamson, Chief Assistant Attorney General,

Carol Wendelin Pollack, Senior Assistant Attorney General, William T. Harter, Supervising Deputy Attorney General, and Kenneth N. Sokoler, Deputy Attorney General, for Plaintiff and Respondent

[Page 1]*

INTRODUCTION

Defendant Sunny Big Keem appeals from a judgment of conviction entered after a jury found him guilty of conspiracy to commit murder (Pen. Code, § 182, subd. (a)(1)) and solicitation of murder *id.*, § 653f subd. (b)).

STATEMENT OF FACTS

Sung Cheol Kim (Pico Kim) and Sung Eun Kim (S. E. Kim) were brothers. S. E. Kim's business, S. E. Distribution, imported display fixtures from the Far East and wholesaled them to Pico Kim, whose neighboring business, Pico Stores, retailed the fixtures to other merchants. Both businesses were profitable. The same family members both businesses, and the entire family lived in one house.

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* Original pagination shown in bracketed bold type.

When Pico Kim died in October 1991, his will directed that Pico Stores be operated by S. E. Kim. Pico Kim's common-law wife, Suk Hyang So (So), demanded a large sum of money in cash, but received nothing; she continued working at Pico Stores. S. E. Distribution began competing with Pico Stores by selling display fixtures directly to merchants.

Sometime after Pico Kim died, Pong Kyun Paek (Paek) told an employee of Pico Stores, Jung Ja La (La), that S.E. Kim was stealing what should be So's property. He said S. E. Kim had removed So's name from ownership documents, replacing it with his own. Paek appeared to be very upset by this. He was a good friend of So

. As S. E. Kim was leaving the business lunch room one day in January 1992, Paek said something in Korean that could be translated as "he is scum," "he is incorrigible," or "he should be killed," "he should die," or "he deserves to die." Paek's tone was quite serious as he said this; he appeared to be expressing hatred of S. E. Kim. La understood the statement to be a threat. [**Page 2**]

In early March 1992, Harley Hall (Hall), an employee of S. E. Distribution saw defendant in front of Pico Stores on several occasions. Hall had never before seen defendant. On one of these occasions, defendant was standing outside, arguing with S. E. Kim. Defendant said, in Korean, "what the heck you are and why [are] you doing this? If you continuously interfere, an unhappy incident [ ] will occur." Defendant used profanity.

At approximately the same time, So introduced defendant to Kenny Suh, the assistant manager of the 345 Alexandria apartments in Los Angeles. After meeting with Suh, defendant and his wife rented an apartment in this building, in which So also lived. So guaranteed their credit and payment of the rent. She issued a check for the initial rent.

Defendant worked at Myoung's Bar in Aurora, Colorado in late 1991 and early 1992. Kevin Brown (Brown) also worked there as a security guard. In late January 1992, defendant asked Donald Bell (Bell), an acquaintance who also performed security services, to collect some money from the owner of a Denver video store. He also enlisted Brown in this

enterprise. Defendant, Bell, Brown and one Ron Taylor went to the store together. Defendant directed the others to tell the owner, a Mr. Sotomatsu, that he did not have a green card and owed defendant money. After Brown and Bell entered the store, Mr. Sotomatsu appeared to be very nervous. At some point, he made a fist and walked rapidly toward Brown. Bell grabbed Mr.. Sotomatsu from behind. Defendant hit Mr. Sotomatsu with a stool; he and Bell fell to the ground. After they left the store, defendant behaved as if nothing had happened.

In late March 1992. defendant asked Bell to come to California with him. Defendant said he was moving his family; he wanted Bell's assistance, as well as that of Brown. His affiliates were involved in a business whose rivals were competing for clients; he wanted Bell and Brown to investigate the source of the competition's money and the location of their production. Defendant was seeking evidence of unfair business practices. He told Bell he would establish a private detective agency through his boss [**Page 3**] which Bell and Brown could join. Bell and

Brown were both interested. They traveled to California with defendant and his family, arriving on March 29, 1992. Brown and Bell stayed at defendant's apartment.

Shortly after defendant, Brown and Bell arrived in Los Angeles, Paek came to the apartment. Defendant introduced him to Bell and Brown as "your boss and your client." Defendant also introduced them to So's younger brother, Byang Sam So. Pack told Brown and Bell they would be following various people who were involved with a competitor's business to ascertain where the competitor banked and where he produced and warehoused his products. On the evening of March 29, defendant, Bell and Brown dined with Pack and his wife at the Pack residence. At that time, defendant provided them with more details concerning the investigation they were to undertake

On the following morning, March 30, defendant showed Brown and Bell the two stores and pointed out some of the people involved. When they entered Pico Stores, they encountered Pack. At this time, defendant introduced them to So; he said

she was the owner of the store. Defendant identified the competition as S. E. Distribution. At approximately 5:30 p.m., Bell and Brown began surveillance at Pico Stores. Throughout the following week, they followed either S. t. Kim or a carpenter who supposedly was setting up a secret warehouse. Defendant told them that S. E. Kim would be driving a silver or white Acura. He said Kim was a key person in the rival business; Bell and Brown should ascertain where he lived.

After following S. E. Kim and the carpenter for two days in Bell's automobile, Bell asked defendant to supply an automobile with California license plates; this would make surveillance easier. Paek and defendant spoke briefly in Korean, after which Pack told Bell it would be taken care of on the next day. Bell and Brown rented two automobiles on April 1, 1992; defendant used one of these vehicles. At some point, Brown and Bell went to Pack's residence and provided him with a status report of their investigation. [**Page 4**]

On April 1 or 2, Bell and Brown attempted to follow S. B. Kim to his home; they failed. Paek

then directed So's brother to show them where S. B. Kim lived. So's brother took them to the residence.

Late on the night of April 3, 1992, defendant went into Brown's and Bell's room. He said, "We feel that Mr. Kim needs to die." He said S. E. Kim had cheated someone close to defendant out of an inheritance. Defendant asked Bell and Brown whether they were willing and able to kill S. E. Kim; he asked how much money they wanted to do this. Bell said it could be done. He suggested silenced weapons; Brown suggested knives. Defendant suggested kidnaping S. E. Kim, taking him to the desert and shooting him there. He also suggested hiding in the bushes along Kim's driveway and shooting Kim with a silenced pistol. Bell said that approach might attract attention. Defendant then suggested breaking into Kim's residence, making it appear that a burglary was occurring, then shooting Kim.

Bell and Brown led defendant to believe they were amenable to the idea of killing S. E. Kim, but as they discussed the matter with defendant, they began using the number 12 in their conversation.

This was a code they used when they believed they were in trouble. Defendant told Brown and Bell that they probably would have to go to Korea after the killing and remain there for some time. He suggested that they study under his martial arts instructor in Korea and promised to take care of them when they returned. At this point, the telephone rang; defendant answered. when he returned from taking the call, he told Bell and Brown that he would have guns in two or three days. He then suggested that they get some rest. They told defendant they would inform him of their decision in the morning.

After defendant left their room, Bell and Brown agreed they would not kill S. E. Kim. They decided they should leave immediately. They packed, wafted two or three hours, then left the apartment in their rented automobile; They parked behind the rental agency and waited for it to open for business. Once the agency opened, Brown and Bell [**Page 5**] returned the automobile. They then left for Colorado in Bell's vehicle. They arrived at Brown's residence late on the evening of April 4,

1992.

Fearing retribution from defendant and not wishing to be implicated should S. S. Kim be killed, Bell and Brown went to the Aurora police station on Monday, April 6. They told the police of defendant's solicitation of S. E. Kim's murder; Bell wrote and signed a statement. when questioned whether he had been involved in other criminal activity with defendant, Bell said he had not. He was afraid the police would not believe what he said about the murder solicitation if he admitted involvement in other criminal activity. He also wished to avoid prosecution in the Sotomatsu incident. Brown revealed their participation in that incident during a follow up interview, however. Defendant telephoned Bell on April 17, 1992. He said he was in town and wished to meet with Bell. Bell telephoned the police and informed them of this conversation. When Bell went to the police station, he was arrested for assault in the Sotomatsu incident. He was released on bail two days later. Bell pleaded guilty to third degree assault on May 11, 1993. Brown also was arrested. He pleaded

guilty to conspiracy to commit first degree assault on December 31, 1992, pursuant to a plea bargain. One condition of the plea bargain was that he cooperate by testifying about defendant's solicitation if requested to do so.

Aurora Police Detective Joel Humphrey arrested defendant on April 17, 1991, at Myoung's Bar. Upon arresting defendant, Detective Humphrey examined defendant's wallet. It contained a photograph of S. E. Kim which had been taken at his wedding. There was a smaller photograph of Kim's mother attached to it. So had these photographs and negatives.

S. E. Kim evidently feared assassination during April and May 1992. There was great tension between the employees of S. E. Distribution and those of Pico Stores during this period. He occasionally wore a bulletproof vest. On May 21, 1992, an unknown man shot S. E. Kim five times from close range, in the driveway of Kim's residence, killing [**Page 6**] him. The man did not take any of Kim's property. This man immediately got into a van driven by another and departed.

Eyewitness descriptions of the killer and the driver of the van did not match descriptions of defendant or Paek. Witnesses described the killer as a young, tall, thin man of African-American or Korean heritage.

Los Angeles Police Detective James Tiampo interviewed Paek on June 23, 1992. Paek said his wife and So had grown up together in Korea; they were lifelong friends. So was in financial straits; if she lost Pico Stores, she would be destitute.

Between November 1991 and May 1992, there were many telephone calls from defendant's house in Aurora, Myoung's Bar and defendant's sister's Colorado home to Paek's residence in Los Angeles. Fifteen of these calls were made from Myoung's Bar, fourteen were made from defendant's home and three from his sister's home. Two calls placed from his sister's home and four placed from Myoung's Bar were made while defendant's wife remained in California.

Defense

Kenneth D. Adams (Adams), a private investigator and collections agent in Aurora, Colorado, subcontracted work to Bell in May or June 1992 and November 1993. Bell told Adams he had been in the military for 10 years. He said he participated in covert actions, made approximately 250 parachute jumps and had gone into Cambodia looking for American prisoners of war. In addition, he said he had exposed a black market ring headed by an American sergeant who then threatened to kill him. He had been framed and court-Merthiolate. Bell also told Adams he owned a security business which he sold for a large sum of money. He said he had been a member of the 1988 United States Olympic Judo team. In Adams's opinion, Bell was not an honest or truthful person. [**Page 7**]

In April 1993, Bell asked Cheryl Hinrichs (Hinrichs), who then was dating him, to buy a cellular telephone due to his imperfect credit. He assured Hinrichs that he would make the payments. He did not do so, leaving Hinrichs with a $1,000 telephone bill.

Bell told Hinrichs he was highly skilled in

martial arts. He said he had participated m covert operations while he was in the military; he owned a large security company and a bar in Korea. He also said he had pre-law and pre-medical degrees. In Hinrichs's opinion, Bell was not honest or trustworthy.

Bell failed to pay William Andrejasich (Andrejasich), his employee in 1993, for services rendered or gave him bad checks. He told Andrejasich he had worked for a criminal investigative unit in the military. In Andrejasich's opinion, Bell was untrustworthy and a liar.

Brown also considered Bell to be dishonest. Bell never paid Brown for his work, telling him he had used the money to pay a telephone bill instead.

According to Migeun Keem, defendant's wife, she has been a close friend of Mrs. Paek for three or four years. Mrs. Pack confirmed their degree of friendship. During late 1991 and early 1992, Mrs. Keem made frequent telephone calls to her friend, Mrs. Pack. She made all the calls placed from the Keem residence and believed she also bad made the calls placed from Myoung's Bar, where

she occasionally worked without remuneration. She never saw her husband place telephone calls from the bar. According to Mrs. Pack, she received many telephone calls from Mrs. Keem, one of which was placed from Myoung's Bar. None of the calls were made to her husband. Defendant telephoned the Pack residence from his sister's home in April 1992 because his wife was there.

Mrs. Keem decided to move to Los Angeles in late 1991 or early 1992; the weather was too cold in Colorado and there was no work for her. Defendant agreed to the move. Defendant and Mrs. Keem came to Los Angeles at the end of February 1992 to look for an apartment. They stayed with the Paeks. when Mrs. Keem decided on an [**Page 8**] apartment, So went with her to rent it. She had never met So before that day. Since the apartment manager would not accept cash or an out-of-state check, So kindly wrote a check for the manager. Mrs. Keem then wrote So a check. Mrs. Paek corroborated this account of events, adding that So did not live in that apartment building, but her brother did.

Mrs. Keem moved to Los Angeles on approximately March 28, 1992, accompanied by Bell and Brown. Defendant did introduce Brown and Bell to Pack when they dined at the Paek residence that night but Mrs. Keem did not hear him refer to Pack as their boss and client. Mrs. Pack did not bear the men discussing business that evening, but she was not seated at the table. She believed So had been cheated out of her inheritance. Since moving to Los Angeles, Mrs. Keem had returned to Colorado only once, in 1993.

At So's request, Paek began working at Pico Stores in March 1992; he had worked. there approximately 8 to 10 years earlier. At about this time, an attorney suggested that Pico Stores hire a private investigator. Paek accompanied So to the attorney's office due to his wife's friendship with her. Paek believed So bad been cheated out of her rightful inheritance.

Paek had been friends with defendant for many years. Defendant and his wife often stayed with the Packs. On February 18, 1992, defendant

met So at the Pack residence. When So inquired, Pack told So that defendant knew a private investigator. Pack had no telephone conversations with defendant between November 1991 and March 1992. when defendant introduced Paek to Brown and Bell, he did not use the words "boss" or "client." Pack did not employ defendant to do anything. Defendant never asked Pack about providing a rented automobile to Brown and Bell. Additionally, he never asked Bell or Brown about the investigation, although be did ask So about it. [Page 9]

CONTENTIONS

I

Defendant contends there is insufficient evidence to sustain his conviction of conspiracy to commit murder.

II

Defendant asserts the prosecutor committed misconduct in demanding notes from Karen Bowers and the trial court erred in striking Bowers' testimony as a discovery sanction.

III

Defendant further asserts the trial court erred in admitting evidence that S. E. Kim was killed.

IV

Finally, defendant contends the trial court erroneously instructed the jury with CALJIC No.2.11.5 and refused a pinpoint instruction concerning the acts or declarations of one not apart of a conspiracy. [**Page 10**]

DISCUSSION

I

Defendant contends there is insufficient evidence to sustain his conviction of conspiracy to commit murder. We disagree.

In assessing the sufficiency of the evidence to sustain a conviction, this court must view the entire record, including all reasonably deducible inferences, in the light most favorable to the judgment. The conviction will be upheld if it is supported by substantial evidence, i.e., evidence

which is credible and bf solid value. (*People v. Perez* (1992)2 Cal.4th 1117, 1124; *People v. Poggi* (1988) 45 Cal.3d 306, 324-325.) It is only when the evidence, so viewed, would pot permit any reasonable trier of fact to have found the defendant guilty beyond a reasonable doubt that the judgment will be reversed. (See *People v. Bloom* (1989)48 Cal.3d 1194, 1208.)

A conviction of conspiracy requires proof that two or more persons agreed to commit a criminal offense and committed an overt act in furtherance of the conspiracy. (*People v. Blelmontes* (1988)45 Cal.3d 744)789; see *People v. Horn* (1974)12 Cal.3d 290,296.) There may be a tacit mutual understanding rather than an express agreement. (*People v. Johnson* (1969)276 Cal.App.2d 232,237; *People v. Sanchez* (1961)197 Cal.App.2d 617, 620.) The understanding between the parties may be established by circumstantial evidence rather than by showing an actual meeting and agreement. (*People v. Zamora* (1976)18 Cal.3d 538, 559; *In re Darrell T.* (1979)90 Cal.App.3d 325, 334.) Accordingly, 'The unlawful

agreement among conspirators may be inferred from the conduct of defendants in mutually carrying out a common illegal purpose, the nature of the act done, the relationships of the parties, the interests of the alleged conspirators and other circumstances [." (*People v. Remiro* (1979) 89 Cal.App.2d 809, 843; accord, *People v. Superior Court (Qutnteros)* (1993) 13 Cal.App.4th 12, 20-21.) **[Page 11]**

A conviction of criminal conspiracy does not require the completion of the substantive offense. (*People v. Sconce* (1991) 228 Cal.App.3d 693, 700.) Moreover, the overt act need not itself be criminal; it need only be done in furtherance of the objective of the conspiracy. (*Ibid.*)

Inasmuch as a criminal conspiracy requires the participation of two or more individuals, a conviction necessarily includes a finding that some other person conspired wit the defendant. (*People v. Taylor* (1974)12 Cal.3d 686, 694.) Thus, when all other alleged coconspirators have been acquitted or the charges against them dropped for insufficiency of the evidence, the defendant's conviction cannot stand if it hinges upon a finding

that he conspired with one of the acquitted or dismissed coconspirators. (Id at pp.694-695.) There is an exception to this rule when, as here, an information charges that the defendant conspired not only with one or more named coconspirators but also with others whose identity is not known. Notwithstanding the acquittal or dismissal of other alleged coconspirators, "[i]f there is evidence from which it can be inferred that persons other than the codefendants conspired with [defendant then the conviction may stand." (*People v. Sagehorn* (1956)140 Cal.App.2d 138, 146; accord, *People v. Cohen* (1970) 12 Cal.App.3d 298, 327.)

Assuming arguendo that the dismissal of charges against codefendant Paek after the jury failed to reach a verdict as to his guilt or innocence is the equivalent of an acquittal (but see *U. S. v. Pratt* (1st Cir. 1990) 913 F.2d 982, 992; *U.S. v. Dakins* (D.C. Cir.. 1989) 872 F..2d 1061, 1065; *United States v. Sangmeister* (9th Cir. 1982) 685 F..2d 1124, 1127) [1], defendant's conviction need

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1. Contrary to. defendant's belief, in moving to

not be reversed if there is evidence from which [**Page 12**] the jury could have inferred that defendant conspired with So to murder S. B. Kim. There is such evidence.

So is the common-law widow of Pico Kim, the brother of the victim, S. E. Kim. Until the

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dismiss the charges against Paek, the prosecution did not concede that there was insufficient evidence upon which to secure Paek S conviction. The prosecution conceded only that the evidence against Paek was somewhat weak and, given the experience with this jury, another hung jury or an acquittal therefore was more likely than a conviction. A number of jurors found no reasonable doubt as to Paek's guilt. Based on the evidence, other jurors could have been uncertain whether Paek was an active participant in the conspiracy or simply a communications conduit for So. That uncertainty could have engendered reasonable doubt. Moreover, some jurors could have found reasonable doubt in Pack's lack of motive other than friendship with So. Whatever the case, it is doubtful that this particular dismissal is the equivalent of an acquittal.

That the jury found four charged overt acts untrue does not change the calculus. The charged overt acts were phrased in the conjunctive. Thus, if the jury found even one conjdined part of each charged overt act untrue, it was obliged to find the entire charged act untrue, even if it believed the remaining parts to be true

death of Pico Kim, the Kim brothers operated adjacent businesses. S. E. Kim wholesaled display fixtures, while Pico Kim retailed them. After Pico Kim's death in 1991, a dispute arose over So's entitlement to an inheritance. So demanded a large sum of money from the estate, but received nothing. Pack told several people that S. E. Kim cheated So out of her rightful inheritance. He also stated that So's name bad been removed from the deed to a certain property; it had been replaced by that of S E. Kim. In recounting this, Paek said something to the effect that S. E. Kim should be dead. Additionally, S. E. Kim began to compete with the business of the late Pico Kim, selling fixtures at retail rather than merely at wholesale. So faced the loss of the business and her home. From this evidence, the jury could have inferred that So had a strong motive to kill S. E. Kim.

Paek, whose wife was a close friend of So, engaged the assistance of defendant. Defendant, who was unacquainted with S. E. Kim, engaged the services of Bell and Brown to undertake the surveillance of S. E. Kim. When defendant arrived

in California with Bell and Brown So found an apartment for him in the same building in which her brother lived and guaranteed payment of the rent. She made the initial rent payment. So provided photographs of S. E. Kim to permit Bell and Brown to identified him. On one occasion, So's brother drove Bell and Brown to S. E. Kim's home. This is evidence of [**Page 13**] So's active involvement and close cooperation in the pursuit of S.E. Kim. Moreover, having So's brother show Brown and Bell where S. E. Kim lived had no relationship to the simple surveillance of S. E. Kim's business. The jury could have inferred that So and defendant were making certain that Bell and Brown would be able to carry out another task, murder.

Shortly after Brown and Bell were shown S. E. Kim's home, defendant told them, "We feel that Mr. Kim needs to die." He said S. E. Kim had cheated someone very close to him out of an inheritance - information be could have gotten only from Paek or from So herself. Defendant asked Brown and Bell to kill S. E. Kim. They then discussed ways in which this could be done.

Defendant suggested breaking into Kim's residence and faking a burglary. He also suggested lying in wait in the bushes along Kim's driveway and shooting him with a silenced gun. This conversation links the trip to S. E. Kim's home to a murder plan. Jt also makes it clear that defendant conspired with someone to see that Kim was killed. Inasmuch as So had a strong motive to kill S. F. Kim, accommodated defendant by setting him up in an apartment, provided photographs so that he, Bell and Brown could identify S. E. Kim and made her brother available to show them Kim's residence, the jury reasonably could have inferred defendant conspired with So. Accordingly, defendant's conviction of Conspiracy to commit murder need not be reversed.

II

Defendant asserts the prosecutor committed misconduct in demanding notes from Karen Bowers and the trial court erred in striking Bowers' testimony as a discovery sanction. We find any possible error harmless.

Defendant called Karen Bowers (Bowers), a

Colorado journalist, as a witness. Bowers had written an article about this case in July 1992. In preparing the article, she interviewed Bell and Brown. Bell told her he was in army intelligence for 10 years. He [**Page 14**] had performed many covert operations, including drug investigations. He asserted it would require special clearance to obtain his military file. Bell also said something about being a respiratory specialist. He said his nickname was "Snake." He acquired the name from his family's operation of a rattlesnake farm in Texas. Brown told Bowers he served with the Marines as a sniper in the Middle East, earning medals for his participation in sensitive operations.

The prosecutor asked whether Bowers had prepared the article from notes she had taken. She replied that she had done so. The prosecutor asked whether Bowers had the notes with her; she said she did not. She further stated that she could not provide the notes. The prosecutor thereupon sought a court order that Bowers produce her notes. The trial court ruled the notes were privileged. Inasmuch as a lack of access to the notes denied

the prosecution its rights of confrontation and effective cross-examination, the court ruled, Bowers's testimony was stricken.

We find it unnecessary to discuss whether the prosecutor committed misconduct in seeking Bowers's notes or the trial court erred in striking her testimony. The testimony Bowers gave was relevant only to the credibility of Bell and Brown.

Bell had told Adams he did covert action for the military for approximately 10 years; he had entered Cambodia in search of United States prisoners of war and had exposed a black market ring. Bell also told Hinrichs and Adresich that he had done covert action for the military.

Bell admitted he was given to exaggeration and sometimes lied. He acknowledged he had lied about his professional background on occasion.. He admitted he changed the name of his business to elude creditors and had paid people with bad checks. Brown characterized Bell as dishonest. According to Adams, Bell frequently embellished stories. Adams ascertained that Bell had made a false claim of being on the United States Olympic

Team. Bell told Hinrichs he owned a bar in Korea and had a large security business - an obvious lie. He paid Andrejasich with bad checks. He failed to pay [**Page 15**] Hinrichs for a cellular telephone be induced bet to purchase and left a $1,000 telephone bill unpaid.

Bowers's testimony clearly was purely cumulative of other testimony concerning Bell's lies, exaggerations and other forms of dishonesty. With respect to Brown, while there is no evidence he falsely told others he had a sensitive position as a sniper for the military in the Middle East, as he told Bowers, there is impeaching evidence. Brown had been convicted of a felony involving moral turpitude for his involvement in the Sotomatsu incident. He avoided a prison sentence through his willingness to testify in this case, thus establishing a motive to give testimony favorable to the prosecution. flowers's limited testimony would have added little to the picture.

In short, both Bell and Brown were thoroughly impeached by other evidence. The exclusion of flowers's testimony thus did not

deprive defendant of a fair trial. Accordingly, even if the prosecutor did commit misconduct by seeking Bowers's notes and or the trial court did err in striking her testimony, defendant has suffered no prejudice.

III

Defendant further asserts the trial court erred in admitting evidence that S. E. Kim was killed. Again, we disagree.

Evidence, whether direct or indirect, is relevant whenever "'it tends logically, naturally, and by reasonable inference to prove or disprove a material issue. (*People v. Jaspal* (1991)234 Cal.App.3d 1446, 1462, quoting from *People v. Jones* (1954)42 Cal.2d 219, 222.) It must ""render [ ] the desired inference more probable than it would be without the evidence.'" [Citations." (*Grimshaw v. Ford Motor Co.* (1981)119 Cal.App.3d 757, 787.) This definition encompasses all evidence which, no matter how weak, tends to prove any issue in a proceeding either directly or by reasonable inference. (*People v. Kronemyer* (1987)189 Cal.App.3d 314,347; *People v. Slocum* (1975) 52

[Page 16] Cal.App.3d 867, 891, cert. den. (1976) 426 U.S. 924.) There is no universal test of relevancy; it must be determined on a case by case basis from logic and experience. (1 Witkin, Cal. Evidence (3d ed. 1986) Circumstantial Evidence, § 309, pp. 278, 279.) The trial court has wide discretion in determining the relevance of evidence, but no discretion to admit irrelevant evidence. (*People v. Edwards* (1991) 54 Cal.3d 787, 817; *People v. Babbit* (1988) 45 Cal.3d 660,681; see also Evid. Code, § 350.)

Over defendant's objection, the trial court admitted a stipulation that an unknown assailant approached S. E. Kim at approximately 7:00 p.m. on May 21, 1992, as Kim stepped out of his automobile in the driveway of his residence, and shot Kim five times at close range with a handgun. The assailant did not attempt to rob Kim or to steal any of his property. Following the shooting, the assailant ran to a van parked nearby and fled. The van was driven by another unknown person. Kim died as a result of the gunshot wounds. Physical descriptions of the assailant and the driver do not

match those of defendant or of Pack.

According to Bell and Brown, defendant solicited them to kill S. E. Kim. He suggested several ways in which this could be accomplished. Among them was hiding in the bushes along Kim's driveway. and shooting Kim with a silenced pistol. The evidence admitted by stipulation tended to corroborate Hell and Brown's testimony. It demonstrated that S. E. Kim was assassinated by a person lying in wait at Kim's residence, in the manner suggested by defendant, less than two months after defendant solicited Bell and Brown to do precisely that. The evidence thus was relevant to Bell and Brown's credibility.

Defendant argues. however, that the evidence admitted by stipulation cannot have been relevant, in that the conspiracy terminated when Bell and Brown returned to Colorado on April 6, 1992. By defendant's reckoning, the subsequent killing of S.E. Kim in a manner consistent with assassination or murder for hire was pure coincidence. [**Page 17**]

The fundamental flaw in defendant's argument is that there is no evidence the conspiracy terminated

in early April, and there is some evidence suggesting the contrary. At the least, Paek had been a communications conduit for So, if not an active participant in the conspiracy. Defendant returned to Colorado on April 17, 1992. He contacted Bell and requested a meeting. Between April 17 and May 10, 1992 there were several telephone calls from Myoung's bar, where defendant had worked, to the Pack residence. These cannot be explained by defendant's wife's friendship with Mrs. Paek, in that defendant's wife remained in California. One may infer, then, that Pack continued to serve as a communications conduit for So and the conspiracy to kill S. E. Kim was ongoing.

The prosecution did not charge the killing of S. E. Kim as an overt act in the furtherance of the conspiracy, in that there was insufficient evidence to prove this beyond a reasonable doubt. The identities of the assassin and driver were unknown; they did not resemble defendant or Pack. It thus was impossible to prove definitively a connection between defendant and the assassin. The timing and the manner of killing, however, do suggest that the

killing probably was the ultimate overt act in furtherance of the conspiracy.

To summarize, there is no evidence the conspiracy terminated before the assassination of S. E. Kim, whose killing bore all the hallmarks of a murder for hire. There is some evidence suggesting the conspiracy was ongoing. The evidence admitted by stipulation provided strong corroboration for Bell and Brown's testimony that defendant attempted to hire them to kill Kim, suggesting the method the actual assassin employed. It thus was highly relevant to their credibility. Accordingly, the trial court did not err in admitting by stipulation the evidence pertaining to Kim's killing. [Page 19]

IV

Finally, defendant contends the trial court erroneously instructed the jury with CALJIC No.2.11.5 and refused a pinpoint instruction concerning the acts or declarations of one not a part of a conspiracy. The contention lacks merit.

The court instructed the jury. with a modified version of CALJIC No.2.11.5 which provided: "There has been evidence in this case indicating that

a person other than a defendant may have been involved in the crime for which the defendant is on trial. [¶ There may be many reasons why such person is not here on trial. Therefore, do not discuss or give any consideration as to why the other person is not being prosecuted in this trial or whether he or she has been or will be prosecuted. Your duty is to decide whether the People have proved the guilt of the defendants on trial." Defendant assumes the instruction was given so the jury would not speculate as to why the killer was not on trial. Inasmuch as the jury knew from the stipulation that the killer had not been identified, there was no possibility of speculation as to why the killer was not on trial. As noted in part III, *ante*, there is substantial evidence So was an uncharged coconspirator. This provided the justification for the instruction. Clearly, the trial court did not err in giving it.

Defendant requested the following instruction: "The act or declaration of a person who is not a member of a conspiracy is not binding upon the members of the conspiracy, even if the

act or declaration tended to promote the object of the conspiracy." (See CALJIC No.6.17.) The court refused to give this instruction, which obviously is premised on the conclusion that the killing occurred after the conspiracy terminated. As noted in part III, ante, there is no evidence the conspiracy terminated before S. E. Kim was killed, and a conspiracy usually ends when the substantive crime is completed or prevented. (*People v. Hardy* (1992) 2 Cal.4th 86, 143.) Given the lack or evidence the **[Page 19]** conspiracy terminated before the killing, this instruction would have been pointless. In short, the trial court did not err in refusing to so instruct the jury.

The judgment is affirmed.

NOT TO BE PUBLISHED

SPENCER, P. J

We concur:

ORTEGA, J., MASTERSON, J.

[Page 20]

Appendix B

Order of the Court of Appeal of the State of California, Second Appellate District, Division One, Filed May 9, 1996.

B086147

Super Ct. No. BA 69210

FILED May 21, 1996

Joseph Lane, Clerk

COURT OF APPEAL OF THE STATE OF CALIFORNIA SECOND APPELLATE DISTRICT, DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

SUNNY BIG Keem

Defendant and Appellant

_____/

THE COURT:

Appellant's petition for rehearing DENIED.

APPENDIX C

ORDER OF THE SUPREME COURT OF THE STATE OF CALIFORNIA AUGUST 14, 1996.

S054299

Second Appellate District, Division One, No.

B086147

FILED Aug. 14, 1996

Robert Wandruff, Clerk

IN THE SUPREME COURT OF CALIFORNIA

THE PEOPLE,

Respondent,

v.

SUNNY BIG Keem

Appellant

_____/

Appellant's Petition for review DENIED.

George

Chief Justice